

No. 83-5320

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1983

TERRY L. FULLMER,
Appellant,

- v -

THE STATE OF UTAH,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF UTAH

APPELLEE'S MOTION TO DISMISS OR AFFIRM

DAVID L. WILKINSON
Attorney General of Utah

EARL F. DORIUS
Assistant Attorney General
Counsel of Record

236 State Capitol
Salt Lake City, UT 84114
Telephone: (801) 533-7606

Attorneys for Appellee

QUESTIONS PRESENTED FOR REVIEW

1. Has appellant raised a substantial federal question in her claim that Utah's statute prohibiting the knowing and intentional use, persuasion, inducement or enticement of a minor to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording or displaying sexual or simulated sexual conduct is unconstitutional as an overbroad contravention of free speech guaranteed by the First and Fourteenth Amendments of the United State Constitution?
2. Has appellant raised a substantial federal question in her claim that the same Utah statute is tantamount to an invasion of appellant's right to privacy?

PARTIES TO THE ACTION IN THE

UTAH SUPREME COURT

Appellee accepts this portion of appellant's jurisdictional statement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE ACTION IN THE UTAH SUPREME COURT	i
TABLE OF CONTENTS	ii
CITATIONS TO OPINIONS AND JUDGMENTS IN THE COURTS BELOW	v
JURISDICTION	v
UNITED STATES CONSTITUTIONAL PROVISIONS AND UTAH STATUTES INVOLVED	v
STATEMENT OF THE CASE.	1
ARGUMENT	
POINT I	2
APPELLANT HAS NOT RAISED A SUBSTANTIAL FEDERAL QUESTION IN CHALLENGING UTAH'S SEXUAL EXPLOITATION OF A MINOR STATUTE AS AN OVERBROAD RESTRICTION OF FREE SPEECH AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	
POINT II	6
APPELLANT HAS NOT RAISED A SUBSTANTIAL FEDERAL QUESTION IN CHALLENGING THE UTAH SEXUAL EXPLOITATION OF A MINOR STATUTE AS AN UNCONSTITUTIONAL DENIAL OF APPELLANT'S RIGHT TO PRIVACY.	
CONCLUSION	10
APPENDIX	
A. INFORMATION	
B. OPINION OF THE SUPREME COURT OF UTAH	

TABLE OF AUTHORITIES

CASES CITED:

Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).	9
Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)	3,4,5,6,9
Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975)	8
Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)	9

CASES CITED (Continued)

Page

Dewey v. Des Moines, 173 U.S. 193 19 S.Ct. 379, 43 L.Ed.2d 665 (1899)	8
Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965),	4
Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 45, 2268, L.Ed. 125 (1975)	6
Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977)	8
Globe Newspaper Co. v. Superior Court, for the County of Norfolk, ____ U.S. ____, 102 S.Ct. ____, 73 L.Ed.2d 248 (1982).	7
Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).	3
New York v. Ferber, ____ U.S. ____, 102 S.Ct. ____ 73 L.Ed.2d 1113 (1982)	3,4,5,6,9
Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973)	7
Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)	3
Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 79 S.Ct. 1196, 3 L.Ed.2d 1280 (1959).	8
Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972)	8
Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)	7
State v. Fullmer and Jordan, No. 18236 (Utah, filed May 26, 1983)	2,7,8
Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1939).	5
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).	8
United States Civil Service Comm. v. National Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).	3
United States v. Maestas, 523 F.2d 316 (10th Cir. 1975)	8
United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).	5
United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930)	9

STATUTES

Utah Code Ann. § 76-10-1201 (Supp. 1981)	vi,10
Utah Code Ann. § 76-10-1206.5 (Supp. 1981)	vi,1,2,3,4 5,6,7,8,9,10
New York Penal Law § 263.15.	5

RULES

Rule 15, Rules of the United States Supreme Court	2,10
---	------

CITATIONS TO OPINIONS AND JUDGMENTS

IN THE COURTS BELOW

Appellee accepts this portion of appellant's jurisdictional statement.

JURISDICTION

Appellee accepts this portion of appellant's jurisdictional statement.

UNITED STATES CONSTITUTIONAL PROVISIONS

AND UTAH STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH STATUTES INVOLVED:

Utah Code Ann. § 76-10-1201 (Supp. 1981).

Definitions. -- For the purpose of this part:

(4) "Knowingly" means an awareness, whether actual or constructive, of the character of material or of a performance. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is criminally negligent.

(6) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of a female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

(7) "Sexual Conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

(8) "Sexual excitement" means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

(10) "Minor" means any person less than eighteen years of age.

Utah Code Ann. § 76-10-1206.5 (Supp. 1981). Sexual Exploitation of Minors.

(1) A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording or displaying in any way the sexual or simulated sexual conduct.

(2) Any person who photographs, films, or records in any way minors in the nude for the purpose of sexual arousal of any person or for profit or engaged in any sexual or simulated sexual conduct is guilty of sexual exploitation of a minor.

(3) Any person who displays, distributes, possesses for the purpose of distributing, or sells material depicting minors in the nude or engaging in sexual or simulated sexual conduct is guilty of sexual exploitation of minors.

(4) It is not a defense to this section that the person who is charged with sexual exploitation of a minor is parent, legal guardian or other person exercising legal control of the child who was subject of the exploitation.

(5) A violation of this section is a felony of the second degree.

STATEMENT OF THE CASE

Based upon information from a confidential informant, police obtained a warrant authorizing a search of appellant's Utah County, Utah residence "for the presence therein of child pornography and other evidence of sexual exploitation of a minor" (R. 6). The warrant was executed on November 3, 1981, and approximately 225 photographs were seized of which thirty pictured Holly Wilkerson, age fourteen years (R. 134-136, 143-144).

A criminal information issued on November 4, 1981, against appellant and Robert Jordan, Jr. charging them with the sexual exploitation of a minor in violation of Utah Code Ann. § 76-10-1206.5 (Supp. 1981):

In that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced or enticed Holly Wilkerson, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct.

(R. 2). See Appendix A. Notably, only those sub-sections of the statute applicable to the facts and circumstances of the case were alleged in the charging document.

During the subsequent bench trial, the trial judge found beyond a reasonable doubt that appellant and Mr. Jordan knew that Holly Wilkerson was a minor at the time the photographs were taken by them (R. 49), and that certain photographs were of Holly in the nude while simulating sexual conduct with appellant and Jordan (R. 49).

Appellant and Jordan were found guilty of knowingly and intentionally using, persuading, inducing or enticing Holly Wilkinson to pose in the nude for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct (R. 49). Each defendant was sentenced to a term not to exceed five years in the Utah State Prison and to pay a fine of \$250.00.

On appeal before the Utah Supreme Court, appellant and Jordan argued that the Utah statute was unconstitutional because it (1) was overbroad, (2) invaded their right to privacy, and (3) was void for vagueness. State v. Fullmer and Jordan, No. 18236 (Utah, filed May 26, 1983).

A unanimous court held that appellant and Jordan had no standing to challenge the constitutionality of Utah Code Ann. § 76-10-1206.5 by alleging the overbreadth of a section of the statute not included in the information against them. Rejecting all three of appellant and Jordan's claims that the statute was unconstitutional, the Utah Supreme Court affirmed the verdict and judgment of the trial court on May 26, 1983. Fullmer, No. 18236 at 9.

ARGUMENT

Appellee in the above-entitled case moves to dismiss and/or affirm on the ground that appellant's direct appeal fails to present a substantial federal question as required by Rule 15 of the Rules of the United States Supreme Court. The overbreadth and privacy questions presented by appellant are not so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

POINT I

APPELLANT HAS NOT RAISED A SUBSTANTIAL FEDERAL QUESTION IN CHALLENGING UTAH'S SEXUAL EXPLOITATION OF A MINOR STATUTE AS AN OVERBROAD RESTRICTION OF FREE SPEECH AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant fails to raise a substantial federal question because (a) appellant has no standing to challenge the overbreadth of statutory language under which she was not charged, and (b) even if appellant does have standing, the statute suffers from no such real and substantial overbreadth as to justify the invalidation of the statute in part or in total.

In New York v. Ferber, ____ U.S. ____, 102 S.Ct. ____, 73 L.Ed.2d 1113 (1982), this Court recognized that states are entitled to greater leeway in the regulation of pornographic depictions of children than is required under the traditional Miller test for adult obscenity. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Although language in Ferber, 73 L.Ed.2d at 1126, refers to child pornography "as a category of material outside the protection of the First Amendment," laws regulating child pornography must still sensitively function so as not to restrict genuine First Amendment freedoms. Ferber, L.Ed.2d at 1126. To that end, the statutory offense must be limited to works that visually depict sexual conduct, by children below a specified age, with a suitably limited and described category of "sexual conduct." Id.

To avoid infringing on protected speech, a child pornography statute cannot be unconstitutionally overbroad. The overbreadth standard to be applied in child pornography cases involving the conduct of taking pictures, filming, etc. is the test of Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Ferber, 73 L.Ed.2d at 1112. Where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's legitimate sweep. Ferber, 73 L.Ed.2d at 1131 (citing Broadrick, 413 U.S. at 615). See also Parker v. Levy, 417 U.S. 733, S.Ct. 2547, 41 L.Ed.2d 439 (1974); United States Civil Service Comm. v. National Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). The overbroad statute must reach a substantial number of impermissible applications.

Appellant has not shown that Utah Code Ann. § 76-10-1206.5 (Supp. 1981) is overbroad according to the Broadrick, standard or that appellant has standing to attack the statute's overbreadth.

proscribes the sexual exploitation of a minor for any of three purposes: first, for sexual arousal; second, for profit; or third, to engage in sexual or simulated sexual conduct:

(1) A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording or displaying in any way the sexual or simulated sexual conduct.

[Emphasis added.] Appellant challenges the statute as overbroad because the second alternate referring to photographing a child in the nude for profit might restrict protected First Amendment expressions that do not involve the type of sexual exploitation of a minor which the State may legitimately restrict. However, appellant was charged by information only with a violation of the third alternate of § 76-10-1206.5, for the purpose of having the minor engage in sexual or simulated sexual conduct:

In that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced or enticed Holly Wilkerson, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct.

(R. 2). See Appendix A. Appellant may not challenge the overbreadth of a statutory provision under which she was not even charged. Appellant was not charged with the knowing use of a minor to pose in the nude for the purpose of profit. Appellant does not argue now and did not argue in the trial court or Utah Supreme Court that the provision under which she was charged (knowing use of a minor to pose in the nude to display simulated sexual conduct) was overbroad. In both Ferber, and Broadrick, the defendants challenged the overbreadth of statutory language included in the charges against them. See also Dombrowski v. Pfister, 380 U.S. 479,

85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed.2d 1093 (1940); United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

These cases do not sanction an overbreadth challenge to statutory language under which the appellant was not charged. "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." Broadrick, at 610. Appellant does not have standing to challenge the overbreadth of alternate language under which she was not charged.

Even if appellant does have standing to challenge the overbreadth of § 76-10-1206.5, the statute does not suffer from such real and substantial overbreadth as to justify the invalidation of the statute in part or in total.

The Utah statute is directed at the sexual exploitation of a minor, as evidenced by its title. It is no more overbroad than the New York Penal Law § 263.15 in Ferber, that prohibited the production, direction or promotion of any performance which includes sexual conduct by a child less than sixteen years of age. Although the Ferber, Court was sensitive to the possibility that the New York statute might extend to medical texts and National Geographic pictorials, it noted that neither party suggested "that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." Ferber, 732 L.Ed.2d at 1133.

The Utah statute's "for profit" language is imbedded in a statute entitled "Sexual Exploitation of a Minor" and would reasonably be interpreted in the context of accompanying language about the sexual arousal of others and sexual or

simulated sexual conduct. The purpose of the statute is not the regulation of "mere nudity without more," but the sexual exploitation of a minor. See generally Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

Any impermissible applications of the Utah statute amount to no more than a tiny fraction of the materials within the statute's reach. Analogous to Ferber, there is no basis for an assumption that Utah courts will widen the possibly invalid reach of the statute by giving an expansive reading to "for profit" so as to include greeting cards and the colorable sportsmanship of little league teams. Under these analogous circumstances to Ferber, Utah Code Ann. § 76-10-1206.5 is "not substantially overbroad and whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions assertedly, may not be applied." Ferber, 73 L.Ed.2d at 1133 (citing Broadrick v. Oklahoma, 413 U.S. at 615-616 (1973)).

As applied to appellant, the Utah statute does not violate the First Amendment as applied to the States through the Fourteenth Amendment. Appellant does not deny that her conduct could be constitutionally proscribed by a statute prohibiting the knowing use of a minor to pose in the nude for the purpose of photographing sexual or simulated sexual conduct. Appellant has not raised a substantial federal question of overbreadth.

POINT II

APPELLANT HAS NOT RAISED A SUBSTANTIAL
FEDERAL QUESTION IN CHALLENGING THE UTAH
SEXUAL EXPLOITATION OF A MINOR STATUTE AS
AN UNCONSTITUTIONAL DENIAL OF APPELLANT'S
RIGHT TO PRIVACY.

Appellant suffered no invasion of her privacy and does not have status to raise the privacy interests of either Holly Wilkerson or hypothetical minors emancipated through marriage.

Appellant was convicted of knowingly and intentionally using, persuading, inducing or enticing a minor to pose in the nude while simulating sexual conduct for the purpose of photographing simulated sexual conduct. Appellant was not convicted of the mere possession of such photos, nor for activity between consenting adults in the privacy of her own home. Although the mere possession of obscene material or such activity between consenting adults may be constitutionally protected under Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), such possession or activity is not regulated by Utah Code Ann. § 76-10-1206.5. The instant case involves a minor and conduct by appellant inducing the minor, not a scenario between consenting adults and the mere presence of materials within appellant's home.

The Fourteenth Amendment guaranties such privacy rights as "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). The appellant and Robert Jordan were not married, nor are either of them related to Holly Wilkerson. The privacy rights connected with marriage and family are clearly not at issue in this case.

This is also not a case concerning the private activity of consenting adults, but a case involving a minor. The State has a compelling interest in "safeguarding the physical and psychological well being of a minor." Globe Newspapers v. Superior Court for the County of Norfolk, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 248 (1982). The Utah Supreme Court was particularly sensitive to the State's "legitimate concern that such exploitation may result in physical or psychological impairment and that depictions as those before us might return to haunt the mature adult." Fullmer, No. 18236 at 6. Even if appellant's right to privacy may have been tangentially affected, the State's overwhelming concern for the minor trumps the adult's privacy rights insofar as the conduct involves a minor.

Appellant also argues for the privacy rights of Holly Wilkerson. Appellant seems to claim that because Holly Wilkerson could consent to her own sexual exploitation by appellant, that Holly's right to privacy prohibits the conviction of appellant. Aside from the dubious characterization of Holly's privacy right, First Amendment cases cited by appellant concerning the free speech of high school students do not support the contention that Holly has a privacy right determinative of this case.¹ As pointed out by the Utah Supreme Court, "The constitutional rights of a minor are not before us; her sexual exploitation by defendant is." Fullmer, No. 18236 at 6.

Appellant may not champion the rights of another on appeal in a case not before this Court. "One may not be heard to challenge the constitutionality of a statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." United States v. Maestas, 523 F.2d 316, 322 (10th Cir. 1975); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).

Appellant further asserts the privacy rights of a hypothetical couple with one spouse emancipated by virtue of marriage, but still a minor, for purposes of Utah Code Ann. § 76-10-1206.5 because the spouse is under eighteen. Appellant has not previously raised this issue of married minors either in the trial court or the Utah Supreme Court. A litigant may advance different theories or arguments in support of questions raised in state court. Dewey v. Des Moines, 173 U.S. 193, 198 19 S.Ct. 379, 43 L.Ed. 665 (1899). However, a litigant is precluded from urging a federal issue that was not raised or decided below, even though such an issue might have been raised. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, 79 S.Ct. 56, 3 L.Ed.2d 1280 (1958). Appellant

¹ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (students wearing arm bands to protest Viet Nam war); Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977) (birth control article in student newspaper); Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972) (underground newspaper distributed off campus).

introduces a new federal privacy issue involving new, albeit hypothetical, parties on this appeal.

Even if appellant may now present this privacy issue on appeal, appellant's conduct falls within the hardcore of exploitation meant to be proscribed by § 76-10-1206.5.

Appellant was not married to Holly Wilkerson, but to another male "friend." When faced by conduct obviously covered by a challenged statute, this Court quoted Mr. Justice Holmes, "if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns."

Broadrick v. Oklahoma, 413 U.S. 601, 609, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citing United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed.2d 508 (1930)). See Alderman v. United States, 394 U.S. 165, 174-175, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Coates v. City of Cincinnati, 402 U.S. 611, 617, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). The conduct of defendants in Broadrick involved the raising of campaign funds by state employees from co-workers and other political activities so clearly within the justifiable scope of the Oklahoma Hatch Act statute that the Court refused to overturn the statute on defendant's claim that hypothetical state workers who merely wore campaign buttons might fall within its restrictions.

In the instant case, appellant was involved in the sexual exploitation of a minor that grew out of a "friendship" among appellant, her live-in boyfriend, and fourteen year old Holly Wilkerson. Appellant's conduct falls within the hardcore of conduct that appellant admits could be constitutionally proscribed under Ferber (appellant's jurisdictional statement at 10). Appellant should not be allowed to escape her conviction on the basis of a hypothetical marriage case not before this Court. Perhaps

with the benefit of full argument by genuinely interested parties, the Utah courts could correct any deficiencies in § 76-10-1206.5 through statutory interpretations of implied exceptions to the definition of a minor in Utah Code Ann. § 76-10-1201(10) (Supp. 1981). ("Minor" means any person less than eighteen years of age.)

CONCLUSION

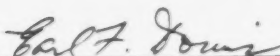
Appellee moves to dismiss and/or affirm on the ground that appellant's direct appeal fails to present a substantial federal question as required by Rule 15 of the Rules of the United States Supreme Court.

Appellant has not raised a substantial federal question in challenging Utah's Sexual Exploitation of a Minor statute as an overbroad restriction of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution. Appellant does not have standing to challenge the overbreadth of statutory language under which she was not charged. Even if appellant does have standing, the statute suffers from no such real and substantial overbreadth as to justify the invalidation of the statute in part or in total.

Appellant has not raised a substantial federal question in challenging the Utah statute as an unconstitutional denial of appellant's right to privacy. No privacy right of appellant restricts State regulation of the sexual exploitation of a minor. Appellant may not assert a privacy right of the exploited minor or the privacy right of hypothetical married minors as a bar to appellant's conviction.

DATED this 20th day of September, 1983.


DAVID L. WILKINSON
Attorney General



EARL F. DORIUS
Assistant Attorney General
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Appellee's Motion to Dismiss or Affirm by depositing same in the United States Mail, first class, postage prepaid, to W. Andrew McCullough, 930 South State Street, Suite 10, Orem, UT 84057, this 20th day of September, 1983.



STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

This is to certify that I mailed copies of the foregoing Motion to Dismiss or Affirm in the case of Terry L. Fullmer v. State of Utah, United States Supreme Court No. 83-5320, by depositing same in the United States mail, first class, postage prepaid, this 20th day of September, 1983, to the following:

W. Andrew McCullough
930 South State Street, Suite 10
Orem, UT 84057

Attorney for Appellant Terry L. Fullmer

Carl F. Davis

SUBSCRIBED AND SWORN to before me this 20th day of September, 1983.

Carol Dahlberg
NOTARY PUBLIC
Residing at Bountiful, Ut.

My Commission Expires:

5/17/86

APPENDIX A

NOALL T. WOOTTON
Utah County Attorney
Room 107, County Building
Provo, Utah 84601

OREM DEPARTMENT
EIGHTH CIRCUIT COURT, UTAH COUNTY
FOURTH JUDICIAL DISTRICT, STATE OF UTAH

STATE OF UTAH, :
Plaintiff, :
-vs- : INFORMATION
ROBERT JORDAN, JR., :
TERRY L. FULLMER, :
Defendant(s). : Criminal No. 81 CIP 685
322

The undersigned PETE HANSEN under oath states on information and belief that the defendant(s) committed the crime(s) of:

SEXUAL EXPLOITATION OF A MINOR, a Second Degree Felony, at Utah County, Utah, on or about ~~November 2~~ September 15, 1981, in violation of 76-10-1206.5, Utah Criminal Code, as amended, in that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced and enticed Holly Wilkerson, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct.

This information is based on evidence obtained from the following witnesses: Pete Hansen

Authorized for presentment and filing:

[Signature]

County Attorney

Deputy

[Signature]
COMPLAINANT

Subscribed and sworn to before me this 4th day of Nov, 1981

[Signature]
CIRCUIT JUDGE

NEW
FIR
statute
of chick
ing, or
children
is not
Amend
the Fir
tion of
may be
prevail
not por

NEW
ON W

No.
A New Year
performance

NOTICE
See in the
required
United St
formal or
may print

Section 3

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

State of Utah,
Plaintiff and Respondent,

No. 18235

v.

Robert Jordan, Jr.,
Defendant and Appellant.

State of Utah,
Plaintiff and Respondent,

No. 18236

v.

F I L E D
May 26, 1983

Robert Jordan, Jr. and
Terry L. Fullmer,
Defendants and Appellant.

Geoffrey J. Butler, Clerk

HOWE, Justice:

The defendants appeal their convictions for sexual exploitation of a minor.

Based upon information received from a confidential police informant, a search warrant was issued in November of 1981 for the search of defendants' residence for the presence of child pornography and other evidence of sexual exploitation of a minor. A subsequent daylight search of their home resulted in the seizure of a number of nude photographs depicting one or both of the defendants and a minor in simulated sexual conduct. Unexposed film, flash cubes, a cloth sack and a General Electric color television set were also confiscated during the search. Defendants were charged with sexual exploitation of a minor "in that they knowingly and intentionally used, persuaded, induced or enticed _____, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct" in violation of U.C.A., 1953 (1981 Supp.), § 76-10-1206.5.

Defendants advance three grounds for appeal: (1) the unconstitutionality of the statute; (2) the defectiveness of the search warrant; and (3) failure to grant them a hearing to determine whether the material seized was pornographic.

I.

Defendants challenge the constitutionality of the statute on three separate determinants, viz., it is overbroad, invades their right to privacy, and is void for vagueness. We examine these elements in that order.

Section 76-10-1206.5 provides:

Sexual exploitation of minors. (1) A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording or displaying in any way the sexual or simulated sexual conduct.

1. Defendants contend that the statute is overly broad in contravention of free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution. They also contest its validity on the basis that it sweeps within its ambit behavior not actionable under the test of legal obscenity laid down in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Both of these points were extensively discussed in the recent decision of *New York v. Ferber*, ___ U.S. ___, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) which is dispositive here on several points. It is a rule of long standing both in our jurisdiction and under constitutional principles that in order to be secure within the pale of the First Amendment, behavior must be expressive or it remains unprotected. *Miller v. California*, supra; *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *West Gallery v. Salt Lake City Bd. of Com'rs.*, Utah, 586 P.2d 429 (1978); *Sutton v. Marvidikis*, 6 Utah 2d 238, 310 P.2d 735 (1957); and *Slater v. Salt Lake City*, et al., 115 Utah 476, 206 P.2d 153 (1949). Where conduct is not communicational in nature, but falls instead, as here, into a category of conduct circumscribed by laws enacted for the public welfare, a different yardstick altogether applies. If it can be shown that the statute under attack has a rational relationship to safeguarding minors from harm, it will stand. *Ginsberg v. New York*, supra. Once that relationship has been established the specific provisions of the statute will not be found offensive to constitutional guarantees of the First and Fourteenth Amendments. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

That principle was eloquently restated in *New York v. Ferber*, supra:

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking a statute down on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U.S. at 613. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face. Id. at 1130.

Here the prohibited conduct is not pure speech. It involves the production of visual recordings using minors under a penal statute dealing generally with pornographic and harmful materials and performances, and specifically with sexual exploitation of minors. The defendants' contention that nudity per se, and thus diaper commercials on the public airwaves, could be swept within the ambit of the statute, is not well taken. The language used "to pose in the nude" is clearly modified by three qualifying purposes: (1) sexual arousal, or (2) profit, or (3) engaging in sexual or simulated sexual conduct. Defendants were charged under the latter category. The great majority of the exhibits before us leaves no doubt in our minds that the trial court properly found the depiction to be simulated sexual conduct.

Defendants nonetheless claim that they have standing to attack the constitutionality of the term "for profit" appearing in the statute and contend that that broad language renders the statute invalid on its face, even though their conduct could have been constitutionally proscribed by a narrowly drawn statute. We disagree. Without discussing the issue of whether defendants may rightfully bring such a claim before this Court subsequent to a conviction, or whether they should have brought that claim in the nature of an action for injunctive or declaratory relief, we briefly touch upon the demerit of their argument. The rule still stands that where defendants were not charged with an activity, the adjudication of that activity, though encompassed under the sanctions of

the statute, must await a real controversy. *New York v. Ferber*, supra, at 1129, and cases cited therein. *State v. Vlacil*, Utah, 645 P.2d 677 (1982) (Oaks, J., concurring). The exception to that rule comes into play where overbroad language has a "chilling effect" upon privileged action and constitutes a disincentive so strong that it results in an in terrorem effect within the protection of First Amendment rights. And the standard is high:

The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 45 L.Ed.2d 125, 95 S.Ct. 2268, the litigant is not permitted to assert the rights of third parties.

Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); see also *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In addition, courts have allowed the exception where a constitutional issue could be tested by way of injunctive or declaratory relief where the privileged conduct had been proscribed as to others and the complaining party was contemplating similar conduct. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); see generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

Here the alleged overbroad language in the statute can be narrowly construed, given the context in which it appears, and we do not think that this case lends itself to an adjudication of hypothetical claims not before us. In short, the sexual exploitation of minors is not protected expression of speech, precluding us from invoking the exception to avoid any "chilling effect" of the language. The defendants were not charged with using the minor to pose in the nude for profit, and they cannot rely upon the exception to test that proscribed conduct as it affects others. Moreover, were that offensive part removed from the statute, the defendants would still find themselves charged as before. The guideline as to standing under those circumstances has been nicely put in a metaphor: "When a line of excision is available, one standing within the zone which a truncated statute might reach may be barred from setting up the statute's overbreadth as to others." Note, supra, at 909.

The contention advanced by defendants that the conduct and resulting depiction must meet the Miller standard of obscenity was expressly addressed in New York v. Ferber, supra. In refusing to apply that standard in child pornography cases, the Ferber court fashioned a discrete test from that enunciated in Miller. It reiterated the need for some element of scienter on the part of the defendant. Id. at 1127. The Utah statute passes that test: "A person . . . who knowingly employs . . ." The stated offense "must be limited to works that visually depict sexual conduct by children below a specified age." New York v. Ferber, supra, at 1127. [Emphasis in original.] Again, as applied to these defendants, that test is met. The defendants took photographs of a fifteen year old minor. The category of interdicted "sexual conduct" must also be limited and described. Id. "Sexual conduct" is defined under § 76-10-1201(7) as:

[a]cts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

Once the statute has passed muster on those constitutional requirements, "[t]he Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner, and the material at issue need not be considered as a whole." New York v. Ferber, supra, at 1127. The trial court in this case found that both defendants were aware that the minor was under 18 years of age and concluded that the element of scienter was thus satisfied. We find no error in its judgment.

2. Defendants claim that the statute's reach is tantamount to an invasion of their privacy. But that sophistic argument ignores the fact that we are not dealing here with conduct between two consenting adults in the privacy of their own home which is protected under our laws. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). The rights to privacy guaranteed by the Fourteenth Amendment include "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing [citations.]" Paris Adult Theatre I. v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 at 462 (1973). The constitutional rights of

the minor are not before us; her sexual exploitation by defendants is. That exploitation is validly proscribed by the state which has a compelling interest in the healthy development of its youth during the years of their greatest vulnerability. It has a legitimate concern that such exploitation may result in physical or psychological impairment and that depictions as those before us might return to haunt the mature adult. The statute affords protection against that. The defendants contend that the state has no right to prohibit acts done between consenting people in the privacy of their homes which do not amount to the promotion of obscenity. Although there may be merit in that argument, we part company where they involve the state's minor children whose health, safety, morals and general welfare the state has a legitimate interest to promote and protect. See also *Prince v. Commonwealth of Mass.*, supra.

3. Defendants next claim that the phrase "simulated sexual conduct" is so vague that a person of ordinary understanding cannot guess at its meaning, and that it is therefore a denial of due process under the Fourteenth Amendment to convict them when the punishable conduct is not clearly defined. We disagree.

Inasmuch as the phrase "sexual conduct" is defined, § 76-10-1201(7), supra, the only word capable of misconstruction would be "simulated." As it does not constitute a legal term of art, it is recognizable in simple lay terms as "looking or acting like." Webster's New Collegiate Dictionary (1976) defines the term as "to assume the outward qualities or appearance of [usually] with the intent to deceive." The disputed language is thus sufficiently clear to convey "warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *U. S. v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947) at 1883.

The exhibits before the trial court constituted competent evidence that could have resulted in a finding, beyond a reasonable doubt, that the defendants used the minor to engage in simulated sexual conduct. The defendants' ability to portray simulated sexual conduct would tend to indicate their ability to understand the meaning of that term. We therefore do not accede to their argument that the word is not precisely defined so as to apprise them of the proscribed conduct. Words are symbols of communication and as such are not invested with the quality of a scientific formula. It is enough that they can be construed with reasonable certainty. Beyond that it suffices to add that "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motorlines v. U. S.*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367, 371 (1952).

II.

Defendants next challenge the validity of the search warrant on two grounds: (1) The affidavit was insufficient to support the issuance of a search warrant because it was based on hearsay and not on personal knowledge of the affiant. Also, the reliability of the informant was stated in conclusive terms. (2) The search warrant itself was constitutionally defective because it did not describe with specificity the items sought to be seized but left the decision to the discretion of the officers executing the warrant.

The affidavit was signed by a police officer who received information from a confidential police informant that a "quantity of nude photography, commonly referred to as 'child pornography' is being secreted at the address . . ." given. The photographs depicted the defendants who had possession of them, and a fifteen year old runaway minor. The affiant stated that a description of the runaway and a list of names of people with whom she was known to stay at times had been given to a detective working on that case by the minor's father. The defendants' names were among those provided. The affidavit related the visit of the informant with the defendants and the informant's description of the minor from the photographs as an approximately fifteen year old tall redhead, which matched the description the father had given to the detective. The affidavit ended with the statement that the "above mentioned informant has proven reliable in the past, assisting this department in numerous narcotic operations now pending prosecution."

An affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, so long as the magistrate is informed of some of the underlying circumstances supporting the conclusions. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *Accord McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *State v. Treadway*, 28 Utah 2d 160, 499 P.2d 846 (1972); *State v. Fort*, Utah, 572 P.2d 1387 (1977); *State v. Romero*, Utah, 660 P.2d 715 (1983). The fact situation in the case under review is well within the requirements set under the two-pronged test of *Aguilar-Spinelli*: (1) the affiant set out in detail the bases of his knowledge, and (2) he presented underlying facts which showed the informant to have been reliable in the past, by adding to the general language of reliability the specific information that the assistance in narcotics operations had resulted in pending prosecutions. This is not analogous to the case where an affiant simply stated the title of a movie he never saw in

its entirety and labeled it obscene without searching focus on the question of obscenity. Defendants' reliance on *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968) is therefore misplaced.

This Court accords great deference to a magistrate's determination of probable cause. *State v. Romero*, supra. The standard for probable cause for the issuance of a search warrant is the probability, not a prima facie showing, of criminal activity. *State v. Fort*, supra. Defendants contend that the term "child pornography and other evidence of sexual exploitation of a minor" is so vague and undefinable as to give total discretion in the execution of the search warrant. We do not read the term "child pornography" that broadly. Read in tandem with the specific language in the affidavit for the search and seizure warrant of "a quantity of nude photographs, commonly referred to as 'child pornography'", that generic term takes on the particularity required for proper guidelines in the execution of the search warrant. Nor does the exclusionary rule require that otherwise legally seized evidence be suppressed merely because it was obtained in the same search as evidence not germane to the charge and never introduced at trial. See *State v. Romero*, supra (admitting legal evidence though seized together with illegally obtained evidence). We conclude that the search warrant was properly executed in accordance with the statutory prescriptions found in U.C.A., 1953 (1980 amendment), § 77-23-1, et seq.

III.

Finally, the defendants contend that the trial court committed reversible error when it admitted the inculpatory evidence after defendants had asked for a hearing in compliance with § 76-10-1212(3), to determine whether probable cause existed to consider the material pornographic. In support of their claim, defendants direct our attention to *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2389, 37 L.Ed.2d 745 (1973) and *Marcus v. Property Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Both cases are distinguishable from the case under review as both dealt with proper safeguards against prior restraints in violation of First Amendment rights. In *Heller*, supra, a hearing similar to the one granted by Utah statute, was available to the defendant who did not demand it and was thus foreclosed from suppressing evidence where the warrant was properly issued. *Marcus*, supra, contemplated the seizure for destruction of allegedly pornographic material. In those cases the court held that "any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." *Heller*, supra, at 754. No such prior restraint has been shown to exist here.

The evidence was seized and introduced in support of the charge of sexual exploitation of a minor. It was not seized because it was pornographic, but because it involved the use of a minor for a visual recording of simulated sexual conduct. New York v. Ferber, supra, leaves no doubt that the states are given great deference in regulating sexual depiction of children.

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. [Citing New York legislative findings.] We shall not second guess this legislative judgment . . . The legislative judgment as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child. [Footnote omitted.] That judgment, we think easily passes muster under the First Amendment.

Id. at 1123, 1124.

CONCLUSION

Utah is one of the vast majority of states that has passed legislation prohibiting the production of sexual depiction of children. Section 76-10-1206.5 prohibiting sexual exploitation of minors was not overly broad as applied to these defendants, was not so vague as not to apprise them of the illegality of their conduct, and did not invade their rights to privacy. The affidavit for the issuance of the search warrant described with particularity the nature of the misconduct as well as the reliability of the informant. What evidence was introduced at the trial was properly admitted and proved the charge beyond a reasonable doubt. Even were we to hold, which we do not, that it was error to deny a hearing on the pornographic nature of some of the materials seized, that error was harmless, as well over 24 pictures admitted depicted the proscribed conduct.

The judgment is affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Dallin H. Oaks, Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice